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TTAB

March 21, 2007

BY HAND DELIVERY

Trademark Trial and Appeal Board
United States Patent and Trademark Office
P.O. Box 1451
Alexandria, VA 22313-1451

Re: Cancellation Number 92046037
Bryan Corporation v. Novatech SA
Our Ref.: 25114.0008

79008 374

TRADEMARK FEE PROCESS
RECEIVED
2007 MAR 21 P 3:59
US PATENT &
TRADEMARK OFFICE

Dear Sir/Madam:

Enclosed please find Petitioner's Opposition to Registrant's Motion to Compel Responses to Registrant's First and Second Set of Requests for Production for the above-referenced cancellation. Please return the enclosed yellow postcard with a USPTO date stamp. Thank you.

Sincerely yours,



Kristin H. Landis

KHL:khl

03-21-2007

U.S. Patent & TMO/TM Mail Rcpt Dt. #72

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Trademark Registration No. 3,093,389
Registered May 16, 2006

BRYAN CORPORATION,

Petitioner,

v.

NOVATECH SA,

Registrant.

Cancellation No. 92846037

U.S. PATENT &
TRADEMARK OFFICE

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TRADEMARK FEE PROCESS
RECEIVED

**PETITIONER BRYAN CORPORATION'S OPPOSITION TO REGISTRANT'S
MOTION TO COMPEL RESPONSES TO REGISTRANT'S FIRST AND SECOND SET
OF REQUESTS FOR PRODUCTION**

Pursuant to 27 CFR §§ 2.119(c) and 2.127(a), Petitioner Bryan Corp. hereby opposes Registrant Novatech SA's ("Novatech") Motion to Compel Responses to Registrant's First and Second Set of Requests for Production.

**Documents to and from the FDA Regarding FDA Approval of Bryan Corp.'s Drug
Products SCLEROSOL and STERILE TALC POWDER are not Relevant to this
Cancellation Action**

As discussed in Novatech's motion to compel ¶¶ 7-10, Novatech seeks the Board to compel Bryan Corp. to supplement its responses to Novatech's First Request for Production of Documents no. 35 and Second Request for Production of Documents nos. 1-4, all of which seek documents pertaining to Bryan Corp.'s New Drug Applications ("NDA") for its drug products SCLEROSOL and STERILE TALC POWDER. *See* Novatech's Mot. to Compel ¶¶ 7-10, Exs. A & D. In addition to being overly broad (*see* Second Request for Production of Document no. 2, requesting all documents sent to, filed with or received from the FDA), documents responsive

to these requests are plainly not relevant to this cancellation action and will not lead to the discovery of relevant admissible information. Novatech, however, justifies seeking any and all documents regarding Bryan Corp.'s SCLEROSOL and STERILE TALC POWDER NDAs on the erroneous belief that Bryan Corp. bases this cancellation action upon the FDA's approval of these drug products. As discussed below, Bryan Corp. does not base its Petition for Cancellation on FDA approval of its products. Thus, Novatech's justification for seeking these documents is flawed and its motion must be denied.

1. Documents Pertaining to SCLEROSOL are Irrelevant to this Cancellation Action

Contrary to Novatech's assertions, Bryan Corp. does not base its petition for cancellation in any way on Bryan Corp.'s SCLEROSOL product or mark. *See* Petition for Cancellation. Indeed, Bryan Corp. seeks cancellation of Novatech's STERITALC mark on two bases wholly unrelated to SCLEROSOL. First, Bryan Corp. alleges that Novatech perpetrated fraud upon the United States Patent and Trademark Office when it declared that Novatech believed it had the right to use the STERITALC mark in commerce. Second, Bryan Corp contends that if the STERITALC mark is not cancelled, it is likely that consumers will confuse STERITALC with Bryan Corp.'s superior common law right to use the STERILE TALC POWDER mark, not its SCLEROSOL mark.¹ As such, SCLEROSOL is not relevant to this cancellation proceeding. In addition, given that Novatech has requested *all* documents related to Bryan Corp.'s NDA, it would be unduly burdensome to produce such volume of information to Novatech. Thus,

¹ SCLEROSOL is an aerosol talc product made by Bryan Corp. Like STERILE TALC POWDER, which is a slurry, SCLEROSOL is used for the prevention of malignant pleural effusion. Bryan Corp. does not contend, however, that there is any likelihood of confusion between STERITALC and SCLEROSOL.

Novatech's motion to compel responses to its First Requests for Production of Documents no. 35 and Second Requests for Production of Documents nos. 1, 2, 4, and 6 should be denied.

2. Bryan Corp. Does not rely on the FDA's Approval of STERILE TALC POWDER as its Basis for its Superior Common law Right to the STERILE TALC POWDER Mark

As discussed above, Novatech erroneously claims that Bryan Corp. bases this petition for cancellation on the allegation that Bryan Corp. has the superior right to use the STERILE TALC POWDER mark because Bryan Corp. has FDA approval for the drug product STERILE TALC POWDER. Although Novatech is correct that an element of Bryan Corp.'s likelihood of confusion claim is that Novatech's use of the STERITALC mark will likely cause confusion with Bryan Corp.'s superior common law right to use the STERILE TALC POWDER mark, Bryan Corp. does not base its superior common law rights on STERILE TALC POWDER's FDA approval. Instead, Bryan Corp. bases its claim to superior common law trademark rights to the STERILE TALC POWDER mark on Bryan Corp.'s widespread use of the mark in commerce. Although it is true that without FDA approval Bryan Corp. could not use STERILE TALC POWDER in commerce by selling or marketing STERILE TALC POWDER for patient use, such FDA approval is only a necessary prerequisite to use in commerce, not use in commerce *per se*. See 21 C.F.R. § 355. Thus, the only FDA documents that could perhaps be relevant or lead to the discovery of admissible evidence are those documents evidencing the decision to use the mark STERILE TALC POWDER. Bryan Corp. submits that on March 21, 2007, Bryan Corp. served Novatech with all remaining documents in its possession relating to the FDA's approval of the STERILE TALC POWDER mark. Moreover, it would be unduly burdensome for Bryan Corp. to produce *all* FDA related documents as requested by Novatech. As such, Novatech's motion to compel responses to its First Set of Requests for the Production of

Documents no. 35 and Second Set of Requests for the Production of Documents nos. 1 and 3 should be denied.

Bryan Corp. has fully Responded to Novatech's First Set of Requests for the Production of Documents no. 3

Novatech's First Document Requests no. 3 seeks documents relating to the adoption and use of the term STERILE TALC POWDER in commerce, including correspondence between Bryan Corp. and any consultant, design firm, advertising agency, advertising media, suppliers, printers, and governmental agencies. On October 12, 2006, Bryan Corp. provided Novatech with documents B0003-0008, B 0010, and B0013-0015 which are responsive to this request. Moreover on March 21, 2007, Bryan Corp. supplemented its responses with the following documents; B0018-0072. Bryan Corp. submits that it has no further documents in its possession that are responsive to this request. Consequently, Novatech's motion to compel a further response to its First Set of Requests for the Production of Documents no. 3 must be denied.

Bryan Corp. has fully Responded to Novatech's First Set of Requests for the Production of Documents no. 25

Novatech's First Document Requests no. 25 seeks the production of any documents evidencing any instance or occurrence of actual confusion on the part of any person due to Bryan Corp.'s use of STERILE TALC POWDER and Novatech's use of the STERITALC mark. As STERITALC is not FDA approved and therefore not in use in commerce, Bryan Corp. asserted in its October 12, 2006 responses, and again asserts today, that it does not have any documents responsive to this request. Thus, Novatech's motion to compel supplementation of its First Document Request No. 25 must be denied.

Bryan Corp. Has Supplied Novatech with Documents Responsive to Novatech's First Requests for the Production of Documents No. 30.

On March 21, 2007, Bryan Corp. served Novatech with remaining FDA correspondence regarding the origin of the STERILE TALC POWDER mark. Bryan Corp. submits that it has no further documents in its possession that are responsive to this request. Therefore, Novatech's motion to compel further supplementation to its First Document Requests no. 30 must be denied.

Bryan Corp. has no Documents Responsive to Novatech's First Requests for the Production of Documents No. 33

Novatech's First Document Requests no. 33 seeks "all documents referring or relating to or evidencing or comprising any inquiry, investigation, or survey conducted by or on behalf of Petitioner regarding any issues involved in this cancellation proceeding." To the extent that Novatech seeks documents prepared by Bryan Corp.'s attorneys in anticipation of litigation, Bryan Corp. contends that pursuant to Federal Rule of Civil Procedure 26(b)(3), such documents are not discoverable. Otherwise, Bryan Corp. submits that it has no documents responsive to this request. As such, Novatech's motion to compel Bryan Corp. to supplement its response to Request no. 33 must be denied.

Bryan Corp. Produced all Documents in its Possession Responsive to Novatech's First Request for the Production of Documents No. 37

Novatech seeks the Board to compel Bryan Corp. to supplement its production in response to Novatech's First Document Requests no. 37, which requests "all documents and things referring or relating to Petitioner's prior business relationship with Registrant... ." Although Bryan Corp. objected to this request on the ground that any prior business relationship between Bryan Corp. and Novatech is not relevant to this action, as their relationship did not involve either of the drug products at issue, Bryan Corp. produced the responsive documents in its possession. Bryan Corp. submits that it possesses no additional documents responsive to this

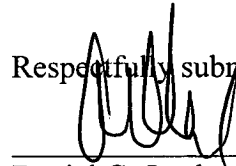
request. Thus, Novatech's motion to compel further supplementation of its First Document Requests no. 37 must be denied.

Conclusion

Based on foregoing, the Board should deny Novatech's Motion to Compel Discovery Responses from Bryan Corp.

Dated: 3/21/07

Respectfully submitted,



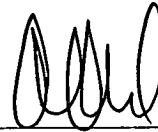
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Attorneys for Petitioner Bryan Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 21 day of March, 2007, a copy of the foregoing document was served, by first class mail, postage prepaid, upon:

John S. Egbert, Esq.
Egbert Law Offices
State National Building
412 Main Street
7th Floor
Houston, TX 77002

A handwritten signature in black ink, appearing to be 'J. S. Egbert', is written over a horizontal line.

Board Examiner